No. 21,109

IN THE

United States Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

WENATCHEE THRIFTY DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

BRIEF FOR WENATCHEE THRIFTY DRUGS, INC.

ENGST, PHELPS AND YOUNG,
P. O. Box 1607,
Wenatchee, Washington,
Attorneys for Respondent
Wenatchee Thrifty Drugs, Inc.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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STATEMENT OF THE CASE

This case is before the Court on petition of the National Labor Relations Board for enforcement of an order of the Board directed to respondent on November 15, 1965. Said order was issued pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.).

A hearing before a Trial Examiner on a complaint issued by petitioner was held and the Decision of the Trial Examiner issued dismissing the complaint against respondent for lack of jurisdiction. Exceptions to the Decision were filed and the Decision and Order of the Board reversing the Trial Examiner is reported at 151 NLRB 752. The Supplemental Decision and Order is reported at 155 NLRB 76.

This Court has jurisdiction under Section 10(e) of the Act for review of the proceedings before the

Board to determine if the findings of the Board are supported by substantial evidence.

The findings to be reviewed are to the questions: (1) Does the Board have jurisdiction over respondent, and if so, (2) Has respondent engaged in unfair labor practices for which enforcement of the Board's order should be decreed by this Court.

The scope of review in determining if substantial evidence supports the findings is stated in *Universal Camera Corporation, Petitioner, v. National Labor Relations Board,* 340 U.S. 474, 95 L. ed. 456.

STATEMENT OF FACTS

A. Jurisdiction

The facts upon which the Board based its conclusions in support of finding the Board had jurisdiction are summarized as follows:

(a) Respondent adopts the facts set forth in paragraphs 1 and 2 of petitioner's brief under subheading A. The Board's jurisdiction: page 3.

(b) Respondent is a separate corporate entity operating its one store in Wenatchee, Washington. (Tr. 13.)

(c) Thrifty Investment Co., Inc. is a separate corporate entity and operates four retail drug stores in the State of Washington located in Pasco, Kennewick, Richland and Quincy. (Tr. 30-33.) The stock of Thrifty Investment Co., Inc. is held 50% by Clarence Olberg and 50% by Gail Hayes. Olberg is presi-

dent, Hayes is vice-president and Ralph Purvis is secretary-treasurer of Thrifty Investment Co., Inc. The annual gross sales of Thrifty Investment Co., Inc. exceed $500,000.00. (Tr. 14-15, 57.)

(d) The manager of Wenatchee Thrifty Drugs is on a full time basis with sole discretion to hire and discharge employees, set wage rates, determine vacation periods, price merchandise, arrange for advertising, and with some discretion in stocking the brand of products. (Tr. 35-38.)

(e) The stores owned by Thrifty Investment Co., Inc., also have independent managers with independent authority on the matters mentioned above. (Tr. 38-39.)

(f) Clarence Olberg is drawn into labor policy only when a controversy arises. (Tr. 39.)

(g) On occasion personnel of the Wenatchee Thrifty Drugs have assisted in taking inventory in the Quincy Store of Thrifty Investment. Further, pharmacists have been exchanged on occasion during vacation periods, in cases of illness and to get more experience and to broaden their viewpoints. (Tr. 48-50.)

(h) Certain correspondence on behalf of Wenatchee Thrifty Drugs originates in a Seattle office. (Tr. 22.)

(i) Certain other services, apparently provided on a contract basis, are provided both Thrifty Investment Co., Inc., and Wenatchee Thrifty Drugs, by another organization. (Tr. 40-42.)

B. Unfair Labor Practices

Respondent adopts the facts set forth in petitioner's brief under Subheading B. The Unfair Labor Practices, except for the addition of the following: That Hayes indicated Joanne Field would have to be laid off because of her pregnancy. (Tr. 85.)

THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Based upon the above-stated facts the Board found:

> "Under all the foregoing circumstances, we find contrary to the trial examiner, that the respondent and Thrifty Investment constitute a 'single employer' for jurisdictional purposes. As the total gross revenue of the Respondent and Thrifty Investment exceeds $500,000.00 a year, and as the Respondent made purchases of materials directly from outside the State valued in excess of $30,000.00 last year, we find that the Respondent is engaged in commerce and that it will effect the purposes of the Act to assert jurisdiction herein."

B. Unfair Labor Practices

The Board's conclusion of law pertaining to violation of Section 8(a)(1) is:

> "By threatening employees with economic reprisals if the Union were selected to represent them, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act."

ARGUMENT

A. THE FACTS DO NOT SUPPORT THE CONCLUSIONS UPON WHICH THE BOARD BASES ITS DETERMINATION OF SINGLE EMPLOYER AND FINDING OF JURISDICTION.

The Petition to the Court of Appeals is under the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151 et seq.) Sec. 10(e) which provides:

> ". . . The findings of the Board with respect to questions of fact if supported by *substantial evidence* on the record considered as a whole shall be conclusive . . .". (Emphasis added.)

Relating the facts of this case to the conclusions of the Board it is submitted such conclusions are unsupported by the facts. Several vital and basic matters should be considered:

1. The Board makes reference to Olberg Thrifty Drugs and certain services which they apparently provide. Such reference by the Board or testimony pertaining thereto is immaterial on the issues before this Court. There is no finding of integration with Olberg Thrifty Drugs. Integration, common management or common policy of Wenatchee Thrifty Drugs and Thrifty Investment cannot be predicated on such services provided by a separate entity.

2. Aside from an exchange of employees by Wenatchee Thrifty Drugs and the Quincy Store of Thrifty Investment Co., Inc. on a very restricted basis, there is no evidence of interrelation of operation. There is absolutely no evidence of common management policies or centralized control of labor relations or pol-

icies. There is no evidence that management policies of all five stores are controlled or uniform. There is testimony they are not. There is no evidence of active managerial participation by the common stockholder in either corporation nor any evidence of common managerial policies.

3. There is no evidence of centralized labor relation policies. The only evidence presented is that the manager of Wenatchee Thrifty Drugs and the manager of Thrifty Investment Co., Inc., consult with the President of the respective corporations if a controversy arises. It is not unusual for management of an entity to consult with a corporate officer of that entity. The record is completely void of any showing of common labor relation policy and in fact is completely void of showing of any labor relation policy at all.

The record is absolutely lacking in showing either management policy or labor relations policy of Thrifty Investment Co., Inc., or that such policies are common to and arise from centralized management with Wenatchee Thrifty Drugs, Inc.

4. There is no showing of any common policy and no showing that the common stockholder formulated or directed any common policy. To the contrary, the only evidence is that the managerial head of each store formulated his own individual policy.

5. The factors the Board considers in determining whether two entities constitute a single employer are those of integration, centralized control of labor relations, centralized management and common owner-

ship. When such factors exist, they tend to show "operational integration", and upon reaching such determination, the gross sales of the integrated entities are considered in determining if jurisdictional standards are met.

It is submitted that none of these factors are established in this case except a degree of common ownership.

The jurisdictional standards have not and cannot be met except on a "single employer" concept, which, of course, cannot be sustained on the facts of this case.

B. THE FACTS DO NOT AS A MATTER OF LAW SUPPORT THE BOARD'S DETERMINATION OF "SINGLE EMPLOYER" AND FINDING OF JURISDICTION.

The finding of fact of jurisdiction by the Board is contained in its Decision and Order Remanding Case to Trial Examiner 151 NLRB 84. The jurisdictional finding of the Trial Examiner in his Supplemental Decision and Order 155 NLRB 84 merely adopts said jurisdictional finding and cites said Decision as the basis of said finding. This is clearly indicated by reason of the original decision of the Trial Examiner dated September 10, 1964, in which the findings did not confer jurisdiction upon the Board.

The exception of the charging party to the original Trial Examiner's Decision dismissing the complaint for lack of jurisdiction was as follows:

1. "To the failure to find common control and Labor Policy of Wenatchee Thrifty Drugs, Inc., and

Thrifty Investment Company, Inc., d/b/a Thrifty Drugs."

The original decision of the Trial Examiner was clearly excepted to on the basis of failure to find an integrated operation upon which to meet the jurisdictional standards of the Board.

Thus, it becomes imperative to determine the basis of the Board's reversal and finding of jurisdiction in the Decision 151 NLRB 84.

On page one of the Decision, the Board states: "The Respondent, Wenatchee Thrifty Drugs, Inc., is a Washington corporation which operates one retail drug store in Wenatchee, Washington. Its gross volume of sales in 1963 was $424,000. For the same period, its out-of-state purchases were valued at approximately $30,000."

At this point nor at any other point in their Decision is any reference made to those facts being sufficient to sustain a jurisdictional finding, nor is there the slightest indication that jurisdiction is based thereon or that the Board would assert jurisdiction on said facts.

The balance of the Decision is directed to the issue of whether Wenatchee Thrifty Drugs, Inc., and Thrifty Investment constituted a "single employer" whose combined gross sales would be sufficient to meet the Board's jurisdictional standards.

Further, the balance of the Decision consists primarily of factual recitals the Board apparently considered in arriving at their conclusion of a "single employer".

The factors considered by the Board in treating separate concerns as a "single employer" are set out in the National Labor Relations Board Twenty First Annual Report, pp. 14-15, and are stated to be:

1. Interrelation of operations.
2. Centralized control of labor relations.
3. Common management.
4. Common ownership or financial control.

It is further stated therein:

> "No one of these factors has been held to be controlling, but the Board opinions have stressed the first three factors, which go to show 'operational integration', particularly centralized control of labor relations. The Board has declined in several cases to find integration merely upon the basis of common ownership or financial control."

Petitioner cites as authority for the single employer concept, *Sakrete of Northern California v. N.L.R.B.*, 332 F. 2d 902, and *A. M. Andrews Co. of Oregon v. N.L.R.B.*, 236 F. 2d 44. These are readily distinguishable on the facts. In the *Sakrete* case all stock of both corporations was held by husband and wife, the conduct of business operations was substantially parallel, both sell the same products and use the same equipment, Sakrete controlled the sale of all products of both corporations, Sakrete retained the right to check the operations of employer, the principal stockholder presided at all meetings of employer and was the ultimate authority for both companies whose operating policies and procedures are almost identical,

the sole stockholder established all companies' policies regarding wages, hours and conditions of employment. He was responsible for sales, purchases of supplies and the hiring and firing of employees.

None of the above facts are present in the instant case except common ownership of a much lesser degree.

Nor does the *A. M. Andrews Co. of Oregon v. N.L.R.B.,* supra, support a "single employer" finding. The facts in that case showed a complete active common management and complete financial dependence and control. Any such evidence is lacking in the present case.

Applying the evidence before the Court on these factors as such is set forth under the statement of facts, it is apparent these tests, except for limited common ownership, are not established and the facts will not sustain a finding of a single employer.

There was a failure to establish jurisdiction because of insufficient facts establishing a single employer under the following cases: *Electronic Circuits, Inc., and United Automobile Workers, Amalgamated Local No. 286, AFL-CIO,* 115 NLRB 940, under facts showing an 80% stock ownership, interlocking boards of directors and services performed for the parent company; *American Furniture Co., Inc.,* 116 N.L.R.B. 206, in which the facts showed a majority of stock of each of the three employers owned by members of one family, interlocking directorate, the companies purchased from each other, and from an

association to which all three employers belong. The record also reflected each employer was a separate legal entity, had its own stores, warehouses, offices, payroll division, financial organization, and filed separate tax returns. Each has a general manager who is in charge of and formulates the operational policies for his store. There are no joint meetings of directors or officers to discuss business policies, no interchange of employees and each does his own hiring and firing and determines its questions of policy. The Board concluded each employer operates independently and is not an integrated enterprise; *The Woodstock Manufacturing Co.,* 116 N.L.R.B. 389, in which common ownership, proximity and bookkeeping was found, but each had separate management, hiring, firing and policies; *Park Plaza Amusement Co.,* 124 N.L.R.B. 53, under facts similar to those in this case, a degree of common ownership and some services provided to the other corporation.

Potential common control is not sufficient to constitute two corporations one integrated employer, *J. G. Roy & Sons v. N.L.R.B.,* 251 F. 2d 771 (C.A. 1). Common purchasing and fiscal service falls short of common management, operations, centralized control and common labor policy. *Worchester Stamped Metal Co.,* 146 N.L.R.B. 1683.

Common management, integration of operations and centralized control of labor relations must be established. *Miami Pressmen's Local No. 46 v. N.L.R.B.,* 322 F. 2d 405 (C.A.D.C.); *N.L.R.B. v. Deerfield*

Screw Machine Products Co., 329 F. 2d 558 (C.A. 6)

C. THE FACTS DO NOT SUPPORT A FINDING OF A VIOLATION OF SECTION 8(a)(1).

The alleged violation of Section 8(a)(1) of the Act concerned a statement of manager Hayes to employee Field,

> ". . . if the union came in the store he would have to cut back his help because he couldn't afford to pay the wages that they would require and he specified three people he would have to lay off and one was Ollie Waite, one was Lena Hoggart, and myself, because of my pregnancy." (Tr. 85.)

Factually the pregnant employee Field has been told by manager Hayes that she could work ". . . as long as I was able to do my work . . ." (Tr. 86) and she did in fact work into her seventh month of pregnancy (Tr. 86). Her employment terminated in November during the annual pre-Christmas season heavy sales period.

In a similar manner, Waite and Hoggart, were part-time employees who had been laid off for the months of January and to June in 1963 (Tr. 96) due to slow business. The record discloses they were in like manner laid off in January 1964. (Tr. 88, 108.)

The Trial Examiner held that this one statement of manager Hayes was an "isolated incident". We submit that upon the failure of the Board to find any discharge had been made because of discrimina-

tion that the statement of manager Hayes will not support a finding of a violation of Section 8(a)(1).

CONCLUSION

The findings of the Board that Wenatchee Thrifty Drugs, Inc., and Thrifty Investment Co., Inc., is a "single employer" and that the gross sales under the "single employer" theory are sufficient to confer jurisdiction is not supported by substantial evidence and it is respectfully requested the Order of the Board be declared void as being without jurisdiction.

Dated, Wenatchee, Washington,
November 9, 1966.

Respectfully submitted,
ENGST, PHELPS AND YOUNG,
By JON H. PHELPS,
Attorneys for Respondent
Wenatchee Thrifty Drugs, Inc.

CERTIFICATE OF COUNSEL

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

ENGST, PHELPS AND YOUNG,
By JON H. PHELPS,
Attorneys for Respondent
Wenatchee Thrifty Drugs, Inc.